

1614154 (Migration) [2018] AATA 2675 (6 June 2018)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1614154
DIBP REFERENCE(S):	OSF2015062884
MEMBER:	Amanda Mendes Da Costa
DATE:	6 June 2018
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Provisional) (Class UF) visa.

Statement made on 06 June 2018 at 2:31pm

CATCHWORDS

Migration – Partner (Residence) (Class BS) visa – Subclass 309 (Spouse (Provisions)) – Whether the public interest criteria should be waived – Bogus documentation – Incorrect information about the visa applicant's citizenship – Visa applicant's family live in Egypt – Compelling circumstances – Live separately – Insufficient evidence of the relationship – Degree of hardship if visa not granted – Decision under review affirmed

LEGISLATION

Migration Act 1958 ss 5F, 65, 359A

Migration Regulations 1994 rr 1.03 1.15A Schedule 2 cls 309.211, 309.211 309.225 Schedule 4 Criterion 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Kaur v MIBP [2017] FCAFC 184

Minister for Immigration and Multicultural Affairs v Dunne [1999] FCA 204

Plaintiff M64/2015 v MIBP [2015] HCA 50

Singh v MEAA [1996] FCA 1429

Trivedi v MIBP [2014] FCAFC 42

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Immigration on 4 August 2016 to refuse to grant the applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
4. The applicant applied for the visa on 17 September 2015. The delegate refused to grant the visa on the basis that the visa and review applicants were not in a spousal relationship as defined by s5F of the Act and that the visa applicant did not satisfy the requirements of cl.309.225 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because she did not satisfy Public Interest Criteria (PIC) 4020 contained in cl. 4020 of Schedule 4 to the Regulations and did not meet the waiver requirements of PIC 4020(4).
5. The review applicant seeks review of the delegate's decision. For that purpose the review applicant provided the tribunal with a copy of the delegate's decision.
6. The review applicant appeared before the Tribunal on 10 April 2018 to give evidence and present arguments. The Tribunal also received oral evidence from [the] visa applicant, by telephone from Egypt.
7. The Tribunal hearing was conducted with the assistance of an interpreter in the Arabic and English languages.
8. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in the present case is whether the parties are in a spousal relationship; whether the visa applicant satisfies the requirements of PIC4020 and if not whether she meets the waiver requirements of PIC4020(4).

Whether the parties are in a spouse or de facto relationship

10. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen. The Tribunal notes that a copy of the bio-pages of [the review applicant]'s passport is on the Department's file. On the basis of the information before it, the Tribunal is satisfied that he is an Australian citizen.
11. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

12. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The parties married at Cairo, Egypt [in] September 2015. A copy of an accredited translation of the marriage certificate was provided to the Department and the Tribunal accepts this document as a genuine copy of the original marriage certificate dated [September] 2015. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F (2) (a).

13. Financial aspects of the relationship

14. The Tribunal must consider all the financial aspects of the relationship including any joint ownership of real estate or other major assets; any joint liabilities; the extent of any pooling of financial resources (especially in relation to major financial commitments); whether either person in the relationship owes any legal obligation in respect of the other and the basis of any sharing of day to day household expenses.
15. [The review applicant] is employed on a full time basis as [an occupation]. He has also invested part of his savings in a [business] in Melbourne. [The visa applicant] is not engaged in paid employment or study and relies on [the review applicant] for financial support. The Tribunal notes that the review applicant provided the Department with evidence of three money transfers from the review applicant to the visa applicant between October 2015 and December 2015. The primary evidence submitted to the Tribunal regarding the financial aspects of the parties' relationship, documents money transfers from the review applicant the visa applicant totalling over US4000.00 between December 2015 and November 2017. The Tribunal notes that [the review applicant] said that he sent US300.00 per month to [the visa applicant] for her financial support.
16. The Tribunal acknowledges that the money transfers and claimed financial support [the review applicant] has provided to [the visa applicant] indicates a degree of financial support to the visa applicant by the review applicant. Accordingly the Tribunal is satisfied that there has been some pooling of their financial resources, although not in relation to meeting major financial commitments. The Tribunal found no evidence that the couple have committed to joint ownership of real estate or other major assets or they have assumed any joint liability stop the Tribunal also found no evidence that either party owes any legal obligation in respect of the other. No evidence was provided to the Tribunal to demonstrate any sharing of expenses by the parties, although the Tribunal acknowledges that this is difficult given that they are living in separate countries.
17. The Tribunal places some weight on the financial aspects of the relationship.

18. The nature of the household

19. In assessing the nature of the household, the Tribunal must have regard to any joint responsibility for the care and support of children (where relevant), the living arrangements of the parties and any sharing of the responsibility for housework.
20. In his oral evidence, the review applicant stated that since the couple's wedding in September 2015, he has travelled to Egypt, from 3 February 2017 to 25 March 2017. During this period the parties travelled to [Country 1] where they stayed in a hotel. They otherwise lived together at the home of [the visa applicant]'s mother. Accordingly although the Tribunal is satisfied that the parties established a household in Egypt during the review applicant's visit, it was for a relatively brief period. The Tribunal finds no evidence during this time of the sharing of responsibility for housework and as the parties have no children, the Tribunal finds no evidence of joint responsibility for the care and support of children.

21. The Tribunal places little weight on the household aspects of the relationship.

22. *Social aspects of the relationship*

23. In assessing the social aspects of a relationship the Tribunal must have regard to all the social circumstances of the relationship including whether the persons represent themselves to other people as being married to each other; the opinion of the persons' friends and acquaintances about the nature of the relationship and any basis on which the persons plan and undertake joint social activities.

24. The parties provided a selection of photographic evidence relating to their wedding in September 2015 and the couple's trip to [Country 1] in February/March 2017. The Tribunal notes that the photographs depict them on their own and although family and friends are depicted in the wedding photographs, no statements have been provided by family members regarding the parties' relationship.

25. The parties provided statements from two friends of [the review applicant] who attended the parties' wedding and attested to the genuineness and continuing nature of the relationship. The Tribunal also finds some evidence that the parties have undertaken joint social activities in Cairo, although for limited periods of time.

26. The Tribunal attaches limited weight to the Form 888 statutory declarations made by [two witnesses] who stated that they each attended the parties' wedding and believed that their relationship was genuine and continuing because they were told this by the review applicant. These declarants do not give particularly convincing reasons as to why they believe that the relationship is genuine and convincing. The Tribunal further notes that these statements are over 2.5 years old and no statements have been provided to the Tribunal by third parties regarding the current status of the parties' relationship.

27. The Tribunal places some weight on the social aspects of the relationship.

28. *Nature of the person's commitment to each other*

29. In assessing commitment to each other, the Tribunal must have regard to the duration of the relationship; the length of time during which the persons live together, the degree of companionship and emotional support that the persons draw from each other and whether the persons see the relationship as a long-term one.

30. As the test of a genuine and continuing relationship involves consideration of the subjective intentions of the parties to the relationship; issues of the parties' credibility may assume particular importance: see *Singh v MEAA* [1996] FCA 1429 at [13] and [24] per Branston J. While the parties provided broadly consistent oral evidence at the hearing, with respect to the matter as a whole, the Tribunal does not find [the visa applicant] to be a truthful witness and is concerned about her motives, particularly in light of the findings the Tribunal has made regarding her false and misleading statements and the bogus document she provided to the Department. The Tribunal is further concerned that she was not truthful in her oral evidence that her Sudanese passport was validly obtained and she did not tell Departmental staff on 14 February 2016 that she was an Eritrean and not a Sudanese national. Accordingly, the Tribunal is not prepared to accept her oral evidence in respect of her commitment to the relations with [the review applicant] and her view that their relationship is a long term one.

31. The Tribunal notes that there is little information or evidence of the degree of companionship and emotional support that the parties draw from each other. The Tribunal does not consider that it can make any positive findings in this regard.

32. The Tribunal notes that the parties have spent very little time together since their marriage and at present have no fixed plans to meet again soon. However the Tribunal notes that [the review applicant] said in his oral evidence that he was waiting for outcome of this review, before travelling to Egypt again.
33. The Tribunal places limited weight on the nature of the commitment of the parties to each other.
34. Having regard to the circumstances of the parties' relationship as required by r.1.15A(3), and after considering all the evidence before it, the Tribunal finds that the applicant does not satisfy the requirements for a spousal relationship contained in s5F of the Act.
35. On the basis of the evidence provided, the Tribunal is not satisfied that, at the time of this decision, that the parties live together, or do not live separately and apart on a permanent basis. The Tribunal finds that s.5F (2) (d) is not met. Further, the Tribunal is not satisfied that, at the time of application and at the time of this decision, that [the review applicant] and [the visa applicant] had a mutual commitment to a shared life as a married couple, to the exclusion of all others, or that the relationship was genuine and continuing. They therefore do not satisfy s.5F (2) (b) and (c).
36. Given these findings the Tribunal is not satisfied that at the time the visa application was made and at the time of this decision, the parties were in a spousal relationship.
37. Therefore, the applicant does not meet cl.309.211 and cl.309.221.

38. Public Interest Criterion 4020

39. The second issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.309.225 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
40. The requirements in PIC 4020(1) and (2) can be waived if there is certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

41. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5 (1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
42. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
43. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
44. PIC 4020 is extracted in the attachment to this decision.

45. Evidence

46. In assessing these issues, the Tribunal has had regard to all the documents on the Department's and Tribunal's files.
47. In the visa application [the visa applicant] gave the following answers to questions about her nationality:

Place of birth?

Kassala, Sudan

Of which countries are you a citizen?

Sudan
48. In her oral evidence [the visa applicant] confirmed that she had included the above answers in the visa application. She admitted that the answers were false as she was born in Eritrea, not Sudan and also held Eritrean citizenship. When asked by the Tribunal for her reason for giving false answers in the visa application, [the visa applicant] said that she was afraid to state that she was born in Eritrea, given that she held a Sudanese passport and it would cause her problems.
49. During an interview with Departmental staff in Cairo on 14 February 2016 [the visa applicant] gave the following answers to questions about her nationality and that of her family:

Where were you born?

I was born in Kassala

What are the full names of your parents? Place of birth and country of residence?

[Mother]– [date of birth] born in Kassala and currently in Kassala

[Father] – [date of birth] born in Kassala and currently in Kassala

50. In answer to a question during the interview about her siblings, [the visa applicant] stated that each of them was born in Kassala.
51. [The visa applicant] confirmed that she had given the above answers in her interview. She admitted that answers were false as she was born in Eritrea, not Sudan and that her parents and siblings were also born in Eritrea and not Sudan. When asked by the Tribunal for her reasons for giving false answers in the interview, [the visa applicant] repeated that she was afraid to state that she was born in Eritrea, given that she held a Sudanese passport as she thought it would cause her problems. She further explained that as long as she was telling the Departmental staff that she was a Sudanese national, her family also had to be Sudanese.
52. [The visa applicant] confirmed to the Tribunal that she had presented a Sudanese passport issued [in] 2015 and an age estimation certificate issued [in] 2015, to the Department in support of her visa application. [The visa applicant] told the Tribunal that she obtained this passport on the basis of her residency in Sudan for over 10 years and her ability to speak Arabic. She said that she when living in Sudan she held a previous age estimation certificate which she obtained in Sudan and held since studying there in primary school, but that she had misplaced the document. She obtained the age estimation certificate issued [in] 2015, on the basis of her Sudanese passport.
53. The Tribunal has obtained a copy of a case note made by Departmental staff in respect of an interview with [the visa applicant] in Cairo on 13 April 2016. That case note, dated 30 May 2016, records the following explanation by the visa applicant regarding the manner in which she obtained her Sudanese passport:
- She is an Eritrean citizen and never obtained the Sudanese nationality.
- Through a friend of hers in Sudan, she paid a sum of 300 Sudanese Pounds to a government official who obtained a Sudanese civil registration certificate for her.
- She presented the Civil Registration Certificate to the Sudanese passport authorities and obtained her Sudanese passport.
54. When asked by the Tribunal whether she had given this information to the Department, [the visa applicant] said “no, not exactly”. She then explained that she had told Departmental staff that she was born in Eritrea and obtained a Sudanese passport on the basis that she had lived in Sudan for a long time. She denied that she had said she obtained her passport through a “government official”. She said that she had used a private clerk who assisted her in filling out the passport application and guiding her through the passport application process. The fee she paid him a fee and not a ‘bribe’ for his services.
55. The Tribunal notes that following her interview on 13 April 2016, the Department sent the visa applicant a letter, inviting her to comment on information obtained by the Department which suggested that [the visa applicant] was not a Sudanese citizen and that the age estimation certificate and Sudanese passport she had provided to the Department were fraudulent.
56. In response, [the visa applicant] sent an email to the Department dated 5 May 2016, in which she explained the following:
- She was born in Eritrea and was an Eritrean citizen, as were the rest of her family.

- She moved to Sudan at [age] years.
 - She acquired Sudanese citizenship on the grounds she had been domiciled in Sudan for a period of 10 years and spoke Arabic (in accordance with the Sudanese Nationality Act 1957).
 - Her mother was not aware that she had acquired Sudanese citizenship.
 - She obtained her Sudanese passport validly in Khartoum through a legal and standard application process.
 - She claimed to be Sudanese because she feared that declaring that she was an Eritrean citizen would jeopardise her visa application and feared approaching the Eritrean authorities to obtain a passport because her family had been involved in anti-government activities in Eritrea.
 - She had submitted a copy of her Eritrean Identification card, issued [in] 2015 and her mother's Identification card, issued [in] 1993.
57. During her oral evidence [the visa applicant] confirmed that she had sent these submissions to the Department and adopted their contents.
58. Pursuant to s359AA of the Act the Tribunal invited [the review applicant] to comment on or respond to the contents of the case of the interview with [the visa applicant] on 13 April 2016. [The review applicant] said that the person referred to in the case note as a 'government official' was not actually a government official he explained that in Sudan there are private clerks who have their own business, assisting members of the public to complete and submit all kinds of government forms. [The review applicant] told the Tribunal this is a common way to complete and submit government forms and the fee paid to such clerks is not a bribe. [The review applicant] posed the rhetorical question: How could [the visa applicant] travel from Sudan to Cairo and from Cairo to [Country 1] if her passport was false? [The review applicant] said that he had discussed the matter with [the visa applicant] after the delegate's decision and she had explained to him that she had used a private clerk to complete her passport application form and that the fee paid by her was not a bribe.
59. On 9 May 2018 the Tribunal wrote to the review applicant pursuant to s.359A of the Act, inviting him to further comment on or respond to the information contained in the Department's file note dated 13 April 2016.
60. The review applicant provided the Tribunal with a written response dated 21 May 2018. In that response the review applicant made the following submissions:
- (a) Eritreans in particular the Jeberti ethnic group, which the visa applicant is from, are allowed to obtain a civil registration certificate and Sudanese passport legally.
 - (b) The reason that the Sudanese government officially sanctions the grant of civil registration certificate and Sudanese passports to the members of the Jeberti ethnic group is because they are persecuted and marginalised severely by the Eritrean government.
 - (c) There was no reason whatsoever for the visa applicant to seek and use a bogus document in whatever form and shape. Every step she took to obtain the documents was legal and followed necessary regulations, directives and decisions under the rule of the land.

- (d) Due to the patriarchal social system in Sudan places a huge burden on females during their visit to, or interaction with this, the state's administrative, financial, immigration and judicial system, women have no option except a high helpers who do engage in the facilitation of the paperwork. Facilitation includes any activity that makes the process easy or easier for women under the legal framework; this includes but is not limited to dealing with the rather Sudanese bureaucracy; photo copying papers, following appointments and taking papers from one office to the other.
- (e) The visa applicant obtained a civil registration certificate and Sudanese passport through a legal and transparent but separate process.
- (f) The civil registration certificate was granted because the visa applicant fulfilled the criteria to obtain it. This included:
- (g) The facilitator did not engage in any part of the process of obtaining the visa applicant's passport; that process was separate from the civil registration certificate and was a stand-alone and straightforward process.
- (h) The male facilitator who helped the visa applicant acted within a lawful framework to facilitate the service that the visa applicant sought. The service included only the non-essential tasks such as standing in queues on behalf of the visa applicant, taking the necessary documents from one office to another and following up on appointments.
- (i) This facilitator was engaged for the sole purpose of solving the male dominated and unfriendly environment and for the effective usage of the processing time and other minor similar reasons.
- (j) The fact that the money paid for the facilitation was 300 Sudanese pounds or AUD13.00 proves that the service provided by the helper was not an essential service and which did not involve any hoax process or bogus document.
- (k) Both he and the visa applicant would be happy to provide the visa applicant's passport to be inspected and verified for its authenticity and they also gave consent for the Sudanese Immigration Department to be contacted if verification and validation of the passport was required.

61. For information to be 'false and misleading in a material particular in the context of PIC 4020 there must be a visa criterion upon which the allegedly false information could materially bear. The definition in cl. 4020(5) (b) focuses upon the materiality of the information. It applies to information which goes to something which will or might determine the visa application and is not concerned with information that is irrelevant to the visa requirements. However, the referable criterion cannot be the one requiring satisfaction of PIC 4020 itself.

62. In *Singh v Minister for Immigration & Anor* [2012] FMCA 145 at [67], Driver FM stated:

63. *Clause 4020(5) specifies that information that is false or misleading in a material particular means information that is false or misleading at the time it is given and relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information*

64. The Tribunal is satisfied on the basis of [the visa applicant]'s evidence that the answers she gave in the visa application regarding her nationality and the answers she gave in interview

with Departmental staff on 14 February 2016 regarding her nationality and that of her family members, were false and misleading, in that she was not born in Sudan and nor were her family members. However, the Tribunal is not satisfied that the false and misleading statements were made relations to a material particular in the contest of a visa criterion.

65. The Tribunal does not find [the visa applicant]'s explanation regarding the provenance and integrity of her Sudanese passport and the manner in which she acquired it, credible. The Tribunal accepts the evidence contained in the Department's case note dated 13 April 2016 and accepts that the visa applicant admitted in her interview that:
- she was an Eritrean citizen and never obtained Sudanese nationality;
 - through a friend of hers in Sudan, she paid a sum of 300 Sudanese Pounds to a government official who obtained a Sudanese civil registration certificate for her; and
 - she presented the Civil Registration Certificate to the Sudanese passport authorities and obtained her Sudanese passport.
66. The Tribunal is satisfied that the reason the visa applicant stated in her visa application and subsequent interview that she and her family were born in Sudan, was to avoid scrutiny of the provenance and integrity of her passport and that if the passport had not been a 'bogus document' there would have been no need for her to give false and misleading statements about her own nationality and that of her family members. The Tribunal is further satisfied that [the visa applicant] intentionally sought to mislead the Department as to the true state of affairs regarding her nationality by purposely providing a bogus document.
67. The Tribunal does not find as credible [the visa applicant]'s response to its questions about her interview with Departmental staff on 13 April 2016. The Tribunal does not accept the Departmental staff were confused about [the visa applicant]'s explanation as to how she obtained her Sudanese passport. The Tribunal notes that she told staff that she was an Eritrean citizen and had never obtained Sudanese nationality. The Tribunal is satisfied that [the visa applicant] would not have said this if she was explaining that she had obtained a valid Sudanese passport. The Tribunal finds that [the visa applicant]'s explanation that she paid money to a government official for a Sudanese civil registration certificate is consistent with her earlier remark that she was an Eritrean citizen and not Sudanese. The Tribunal accepts the Department's account of the conversation between its staff and the visa applicant as set out in the case note in the Departmental file dated 13 April 2016.
68. Accordingly, the Tribunal is satisfied that in relation to her Sudanese passport, [the visa applicant] gave to a delegate of the Minister a 'bogus document' as defined by s5(1) of the Act, i.e. a document that the Tribunal reasonably suspects is a document that was obtained because of a false or misleading statement, made knowingly by the visa applicant.
69. The Tribunal is satisfied that [the visa applicant] intentionally sought to mislead the Department in respect of her nationality, by purposely providing a bogus document.
70. Therefore, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

71. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such

circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.

72. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
73. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.
74. The visa applicant was born in Eritrea and claims to have lived there until 1993 when she left to live with her maternal grandmother in Kassala, Sudan. [The visa applicant] told the Tribunal that her mother took her to Sudan, in order to avoid military conscription in Eritrea. She explained that men and women in Eritrea are subject to compulsory military service without any fixed period of service.
75. [The visa applicant] told the Tribunal that her mother and siblings moved from Eritrea to Egypt in prior to 2013 when she moved to Egypt. She said she had been living in Egypt since then.
76. The parties claim to have met at the wedding of a mutual friend in Kassala, in October 2013. After being introduced by their friend (the groom) they went on two or three outings together, before [the review applicant] returned to Australia. The couple continued to speak via telephone on a regular basis.
77. In December 2014 [the review applicant] proposed marriage to [the visa applicant] by telephone, after seeking formal permission from her brother and mother. The parties married in Cairo, Egypt [in] September 2015. The couple lived together until [the review applicant] returned to Australia in late September 2015. He travelled Egypt in February 2017 to stay with [the visa applicant]. During this visit the couple went on a 10 day trip to [Country 1] for a belated honeymoon. [The review applicant] and [the visa applicant] have not seen each other since [the review applicant] returned to Australia on 25 March 2017. They told the Tribunal that they remain in contact via telephone.
78. [The review applicant] lives in a rented house in Melbourne with one of his sisters. They share rental payments and household expenses. He is engaged in full time employment as [an occupation] and has held this position for approximately 11 years. [The review applicant] works 10 hours shifts for four days each week. He recently purchased a one third share of [a business]. He told the Tribunal that he hoped [the visa applicant] would be able to assist in the business if she were the visa. In the meantime, he was assisting in the management of the business in his spare time.
79. [The visa applicant] told the Tribunal that she was living with her mother and three of her siblings in Cairo. She said she was not engaged in any employment and was not involved in any course of study. The couple have no children.
80. [The review applicant] provides financial support to his wife byway of monthly payments of US300.00. In addition to these regular payments, [the review applicant] provides additional financial support to his wife as she requires.
81. The Tribunal is not satisfied from the evidence of the parties that there are compelling circumstances that affect the interests of Australia that justify the granting of the visa.

82. The Tribunal acknowledges the parties' claim that they do not wish to be apart for any period of time. Whilst the Tribunal notes [the visa applicant]'s claim that she is in a genuine relationship with [the review applicant] and does not wish to be separated from him, the Tribunal has also had regard to the case of *Minister for Immigration and Multicultural Affairs v Dunne* [1999] FCA 204. In that case the Federal Court considered the meaning of the concept of "compelling reasons" in another provision of the Regulations. The Court considered that "compelling reasons" must involve something in addition to the basic pre-requisite criteria for the grant of the visa. In other words, the compelling reasons must go beyond whether or not the visa applicant and sponsor are in a genuine spousal relationship.
83. A genuine relationship forms the basis of all Partner visa applications and hardship caused by separation is common where partners may be separated during the offshore visa processing period.
84. The Tribunal finds the existence of a genuine relationship in itself is not a reason to find that compelling and compassionate reasons exist, and in any event, is not satisfied that such a relationship exists between the parties.
85. The relevant policy guidance regarding the factors relevant to a finding that there are compassionate or compelling circumstances are contained in the Department's Procedures Advice Manual (PAM3). These factors include a consideration of the severity of the fraud committed by the applicant against the circumstances presented.
86. The Tribunal has had regard to the statements of policy in the current version of PAM3. The Tribunal notes that it may have regard to Departmental policy in considering the waiver.
87. The review applicant listed the following factors which, it was submitted, constitute compelling or compassionate circumstances, affecting the Australian review applicant, that justify the waiver:
- (a) the length of the relationship, which has persevered for more than four years;
 - (b) the hardship that is occasioned to the review applicant, being separated from his wife and unable to start a family;
 - (c) the hardship that the review applicant if his wife cannot be granted a partner visa to join him in Australia for three years after the refusal of visa application on the basis of PIC 4020.
88. In determining whether the requirements of PIC4020 should be waived, the Tribunal has had regard to all the circumstances of the matter and in particular the following factors:
- The deliberate and calculated nature of the means by which [the visa applicant] obtained by her Sudanese passport.
 - [The visa applicant]'s living arrangements in which she resides with her mother and some of her siblings.
 - The financial support provided by [the review applicant] for [the visa applicant].
 - The financial and logistical ability of [the review applicant] to visit [the visa applicant] in Egypt.
89. The Tribunal accepts that the review applicant is likely to suffer some hardship if [the visa applicant] is not granted a visa and she is required to wait offshore for a further period of

time. However the Tribunal is not satisfied that such hardship mounts to compelling or compassionate circumstances.

90. Therefore the requirements of PIC 4020(1) should not be waived.
91. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl.309.225.

DECISION

92. The Tribunal affirms the decision not to grant the applicant a Partner (Provisional) (Class UF) visa.

Amanda Mendes Da Costa
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

Public Interest Criteria

- 4020.
- (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5-reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
 - (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
 - (2) The Minister is satisfied that during the period:
 - (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
 - (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
 - (2A) The applicant satisfies the Minister as to the applicant's identity.
 - (2B) The Minister is satisfied that during the period:
 - (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
 - (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
 - (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
 - (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
 - (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen; justify the granting of the visa.
 - (5) In this clause:

information that is false or misleading in a material particular means information that is:

 - (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.